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No. 84

In the Supreme Court of the United States

OCTOBER TERM, 1930

GEO. C. HOPKINS, COLLECTOR OF INTERNAL REVENUE,
PETITIONER

v.

C. W. BACON

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The United States District Court for the Northern District of Texas rendered no opinion. The opinion of the United States Circuit Court of Appeals for the Fifth Circuit (R. 25) is reported in 38 F. (2d) 651.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 28, 1930. (R. 25.) Petition for certiorari was filed April 17, 1930. Certiorari was granted May 26, 1930. (R. 27.)

Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Whether the entire community income of a husband and wife domiciled in the State of Texas for the year 1927 is taxable as the income of the husband; or to state it another way, whether the wife has such an interest in the community income that she has the right to report one-half of such income in her separate return.

STATUTES INVOLVED

The relevant portions of the statutes involved will be found in the Appendix, *infra*, pp. 40–57.

STATEMENT

The respondent was married in Texas in 1894 and since then he and his wife have resided together in that State. (R. 7, 10.)

During 1927 and prior thereto the respondent's wife owned and had possession of certain separate property, the record title to which stood in her name; namely, 18 shares of the capital stock of the H. O. Wooten Grocery Company, a Texas corporation; 6 shares of the capital stock of the Abilene Building & Loan Association, a Texas corporation, and a promissory note bearing 8% interest. (R. 8.) The stock of the two corporations was given to her by her husband from community property and the promissory note represents a loan made by her out

of money given to her by her husband out of community funds prior to 1927. (R. 11.)

All other property owned by the respondent and/or his wife during the year 1927 was their community property under the laws of Texas, the record titles to which were in the respondent's name. The community property in question consisted of real estate located in Texas, shares of stock in Texas corporations, and of interest in oil, gas, and other minerals in and under lands situated in Texas and money loaned at interest evidenced by promissory notes. (R. 8, 11.)

The gross income of the respondent and his wife for the year 1927 was as follows (R. 8, 11, 12):

Interest from loan of community funds	$9,261.77
Interest from loan of wife's separate funds	40.00
Dividends from shares of stock representing community property	29,508.40
Dividends from shares of stock representing wife's separate property	290.00
Rents from leasing community real estate	5,312.18
Royalties (community property)	78.50
Salary of respondent	3,600.00
Director's fees of respondent	120.00
Total	48,210.85

Allowable deductions for the year totaled $6,012.80, leaving a net income subject to tax of $42,198.05. (R. 8.)

The respondent and his wife filed separate income-tax returns for 1927 in which they reported the above-mentioned income and deductions, each reporting one-half of the net income or $21,099.02, and each claiming one-half of the personal exemption. Each return showed a tax liability of $336.25. (R. 8.)

Upon review and audit of these returns the Commissioner of Internal Revenue determined that the entire income should have been reported by the respondent, that all the deductions should have been taken by him, and that his tax should be computed accordingly. Thereafter, an additional assessment of $1,951.88 was duly made against the respondent and was paid by him under protest to the petitioner as Collector of Internal Revenue for the Second District of Texas, together with $23.69 interest, making a total payment of $1,975.57, for the recovery of which this suit is brought. (R. 9, 6.)

The District Court entered judgment for the respondent. (R. 20.) Upon appeal the Circuit Court of Appeals for the Fifth Circuit affirmed the decision of the lower court. (R. 25.)

This court granted certiorari on May 26, 1930. (R. 27.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In not holding that under the laws and judicial decisions of the State of Texas the husband has such control over the community income that he should properly be required to report all of such income in his Federal income tax return for 1927.

2. In holding that the wife has such an interest in the community income that she and her husband are permitted to divide the community income between them in separate returns.

SUMMARY OF ARGUMENT [1]

This Court in the case of *United States* v. *Robbins,* 269 U. S. 315, held that a married man domiciled with his wife in the State of California should be taxed upon all of their community income, basing its decision in part on the fact that the husband alone could dispose of the fund and exercise exclusive rights of management and enjoyment over it.

In *Corliss* v. *Bowers,* 281 U. S. 376, this Court again emphasized that the individual might be taxed on income which he had the right to control and enjoy irrespective of whether he held any title whatever to the fund from which it was derived.

Taxation of income to the person who controls and enjoys it, rather than to the person who holds title to the property from which it is derived, is a principle which is recognized in various provisions of the Revenue Acts. The *Corliss case* involved the constitutionality of Section 219 (g) of the Revenue Act of 1924, c. 234, 43 Stat. 253, 277 (U. S. C., Title 26, Sec. 960), providing for the taxation of the income of revocable trusts to the grantors. Section 219 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 32 (U. S. C. App., Title 26, Sec. 960), provides for taxing the income of certain types of trusts to the trustees, the income of other types to the beneficiaries, and the income of revocable trusts to the grantors.

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[1] The following material to stars on p. 6 is common to all of our briefs in *Poe* v. *Seaborn*, No. 15; *Hopkins* v. *Bacon*, No. 84; *Bender* v. *Pfaff*, No. 86; *Goodell* v. *Koch*, No. 106.

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Sections 210 and 211 of the Revenue Act of 1926, *infra,* p. 40, construed as similar provisions were construed in the ***Robbins case,*** do not require the taxation of income to the individual having purely formal rights of ownership. Their intent is that the tax shall fall upon the person exercising substantial rights of dominion and enjoyment.

In the *Robbins case* the rights of dominion and enjoyment were measured by very practical tests as to what the husband and wife could do with respect to the community income. The possession of unimportant rights by the wife will not suffice to prove that one-half of the community income should be taxed to her, for wives in States not having the community property system also may restrict to a certain extent the husband's disposition of his property and income. The Act should, if possible, be so construed and applied as not to give married taxpayers residing in the community property States an undue advantage over married taxpayers residing in other States.

* * * * * [2]

The question, therefore, is not whether the husband or wife has a "vested" or "expectant" or "legal" or "equitable" title to the community property under the laws of Texas, but what substantial rights of dominion and enjoyment he or she may exercise. The possession of unimportant rights by the wife will not suffice to prove that one-half of the community income should be taxed to

[2] See footnote 1, p. 5.

her, for wives in States not having the community property system also may restrict to a certain extent the husband's disposition of his property and income and are nevertheless not taxed upon it. The Act should be construed and applied, if possible, so as not to give married taxpayers residing in the community property States an undue advantage over married taxpayers residing in other States.

During the existence of the community the Texas husband alone has unrestricted power to make contracts and bring suits relating to community property and to sell, mortgage, or otherwise dispose of it, except that he may not give it away with the deliberate intention of defrauding his wife. An exception which existed at one time as to his control of his wife's earnings and income from her separate estate was not in effect in 1927. The community property is made liable for all debts incurred by the husband and all judgments secured against him of whatever nature and he and his separate property are liable for the payment of all community debts.

On the other hand, the wife can not make any contract which will bind the community property, other than her personal earnings and the income, rents, and revenues of her separate estate. The only exception is that she may contract for necessaries for herself and her children and create a valid community debt. She also has no power to sue and collect a community claim.

Only where she is abandoned by her husband or he becomes insane does she acquire the right to control and enjoy the community property and income. She can not petition for a division of community property without applying for a divorce, and the court in awarding her a divorce and dividing the community property may or may not give her one-half.

Clearly, there is no material difference between the respective rights of husband and wife in California and in Texas and as they existed in California at the time the *Robbins case* arose, and the husband, having all of the present rights of control and enjoyment, should be taxed upon the entire community income.

ARGUMENT

I

Preliminary Statement [3]

The Treasury Department, following two opinions of the Attorney General, 32 Op. A. G. 298, 435, originally conceived that the characterization of the wife's interest in community property as vested or expectant determined whether the husband and wife might divide the community income between them in separate returns or whether the husband should be required to report the entire

[3] The entire argument under Points I and II is common to all of our briefs in *Poe* v. *Seaborn*, No. 15; *Hopkins* v. *Bacon*, No. 84; *Bender* v. *Pfaff*, No. 86; *Goodell* v. *Koch*, No. 106.

amount in his return. See T. D. 3071, Internal Revenue Cumulative Bulletin, No. 3, p. 221; T. D. 3138, Internal Revenue Cumulative Bulletin, No. 4, p. 238. It was accordingly held that a husband and wife domiciled in the States of Washington, Texas, Louisiana, Arizona, Nevada, New Mexico, and Idaho should be permitted to divide the community income between them in separate returns, while a similar privilege was denied to married taxpayers domiciled in California.[4]

Subsequently this Court, in the case of *United States* v. *Robbins,* 269 U. S. 315, indicated that the question as to whether community income shall be taxed to the husband alone or to the husband and wife in equal shares can not be made to depend solely upon whether the wife's interest is vested or expectant, and that in California, where the husband has substantially the sole right to control and enjoy the community property, the community income is properly taxed to him.

Following the decision in the *Robbins case,* the opinions of the Attorney General as to the taxation of income in the community property States were withdrawn (35 Op. A. G. 265), with the recommendation that the Treasury Department take action which would furnish grounds for the com-

[4] This procedure was subsequently given retroactive legislative approval as to 1925 and prior years by Section 1212 of the Revenue Act of 1926, *infra*, p. 41. That section was not intended to apply to taxes for subsequent years, and has no bearing on the question here involved.

mencement of test suits to determine the proper method of taxing community income, the case at bar being one of the cases which has resulted from such action.

II

Where the Husband Has Control Over and the Right to Enjoy the Entire Community Income He Is Required to Include It in His Return for Federal Income-Tax Purposes

In general terms the statute imposes the tax "upon the net income of every individual" without specification of what is included in these words. There is no reference in the statute to income from community property.[5] Such generality is unavoidable in Federal income tax laws intended to have uniform application throughout the States where the definitions of property rights and titles vary with the local laws. The view originally held in the Treasury Department and in the Department of Justice (T. D. 3071, *supra;* T. D. 3138, *supra;* 32 Op. Atty. Gen. 298, 435, *supra*) that the wife has an interest in income from community prop-

[5] It is of interest that while the Revenue Acts of 1921 and 1924 were being drafted it was proposed that there should be included in them a provision for the taxation of community income to the spouse having the right of management and control. See Report of the Committee on Ways and Means of the House of Representatives, Report No. 350, 67th Congress, First Session, p. 11, and Conference Report No. 486 of the same Congress, p. 21; Hearings before the Committee on Ways and Means, House of Representatives, 68th Congress, First Session, Revenue Revision, 1924, pp. 194, 348, 349, 375, 478, 482. These proposals were defeated.

erty equal to that of her husband and should therefore be permitted to report one-half of it in her return was based upon local conceptions of title to the fund rather than of dominion and control of the income therefrom. The contention that the person who has formal title to a fund or to income therefrom must pay the tax when the power of disposition is vested in another finds no support in the language of the statute. Indeed the very generality of the words employed suggests that they are to be understood in their ordinary meaning implying dominion and control and not in any narrow technical sense implying formal, legal, or equitable ownership.

Section 1 of the Revenue Act of 1916, c. 463, 39 Stat. 756, levied a tax "upon the entire net income received in the preceding calendar year from all sources by *every individual.*" (Italics ours.) Sections 1 and 201 of the Revenue Act of 1917, c. 63, 40 Stat. 300, 303, imposed certain taxes upon the net income *"of every individual."* (Italics ours.) Subsequent Revenue Acts have likewise employed the phrase "of every individual." See Sections 210 and 211 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, the statute involved in the *Robbins case, supra,* and Sections 210 and 211 of the Revenue Act of 1926, *infra,* p. 40.

Nowhere in the Revenue Act of 1926 nor in any previous Revenue Act have there been set forth the proprietary rights which an individual must have in particular income to become liable for the tax

thereon. The tax is imposed upon the income of individuals, and the application of this language to specific cases is to be made as they arise. In this process the *Robbins case* points the way. It does not hold that the principle of taxing income to the "owner" of the income is to be discarded, but rather that ownership in the statutory sense must be tested, in cases of community ownership, by the enjoyment of practical rights of ownership and not by words describing the interests of husband or wife or of "the community" as "vested" or "expectant," "legal" or "equitable."

In its opinion in the *Robbins case* this Court said (p. 327):

> But the question before us is with regard to the power and intent of the Revenue Act of February 24, 1919, c. 18, Title II, Part II, Sections 210, 211; 40 Stat. 1057, 1062. *Even if we are wrong as to the law of California and assume that the wife had an interest in the community income that Congress could tax if so minded, it does not follow that Congress could not tax the husband for the whole.* Although restricted in the matter of gifts, &c., he alone has the disposition of the fund. He may spend it substantially as he chooses, and if he wastes it in debauchery the wife has no redress. See *Garrozi* v. *Dastas,* 204 U. S. 64. His liability for his wife's support comes from a different source and exists whether there is community property or not. *That he may be taxed for such a fund seems to us to need no argument. The same and*

> *further considerations lead to the conclusion that it was intended to tax him for the whole.* For not only should he who has all the power bear the burden, and not only is the husband the most obvious target for the shaft, but the fund taxed, while liable to be taken for his debts, is not liable to be taken for the wife's, Civil Code, Sec. 167, so that the remedy for her failure to pay might be hard to find. The reasons for holding him are at least as strong as those for holding trustees in the cases where they are liable under the law. Sec. 219. See Regulations 65, Art. 341. (Italics ours.)

Again, in the case of *Corliss* v. *Bowers,* 281 U. S. 376, this Court recognized that the legal estate was in the trustee and the equitable interest was in the grantor's wife, but nevertheless held the grantor to be taxable upon the income under Section 219 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 277 (U. S. C., Title 26, Sec. 960), which provides for the taxation of the income from revocable trusts to the grantor. In holding this provision to be constitutional, the Court said (p. 378):

> But taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed—the actual benefit for which the tax is paid. If a man directed his bank to pay over income as received to a servant or friend, until further orders, no one would doubt that he could be taxed upon the amounts so paid. It is answered that in that case he would have a title,

> whereas here he did not. But from the point of view of taxation there would be no difference. The title would merely mean a right to stop the payment before it took place. The same right existed here although it is not called a title but is called a power. The acquisition by the wife of the income became complete only when the plaintiff failed to exercise the power that he reserved. *Salstonstall* v. *Salstonstall,* 276 U. S. 260, 271, *Chase National Bank* v. *United States,* 278 U. S. 327. *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339. Still speaking with reference to taxation, if a man disposes of a fund in such a way that another is allowed to enjoy the income which it is in the power of the first to appropriate, it does not matter whether the permission is given by assent or by failure to express dissent. The income that is subject to a man's unfettered command and that he is free to enjoy at his own option may be taxed to him as his income, whether he sees fit to enjoy it or not.

Sections 210 and 211 of the Revenue Act of 1926, *infra,* p. 40, construed as the corresponding sections of the Revenue Act of 1918 were construed by the Court in the *Robbins case,* do not require the taxation of income to the individual having purely formal rights of ownership, their intention being to tax the person having the substantial right to exercise control and enjoyment of the income.

Taxation of income to the person who controls and enjoys it, rather than to the person who holds title to the property from which it is derived, is a

principle which is recognized in various provisions of the Revenue Acts. The *Corliss case,* as previously indicated, involved the constitutionality of a statute taxing the income of a revocable trust to the grantor. Congress has also provided for the taxation of the income of trusts to the beneficiaries in cases where the income is distributable to them and for the taxation of the income of other trusts to the trustees. See Section 219 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 32 (U. S. C. App., Title 26, Sec. 960), and the corresponding provisions of earlier statutes. This device for the taxation of the income from trusts was in effect prior to the decisions in the *Robbins case* and the *Corliss case.* Thus Congress itself did not intend that the imposition of a tax on the net income "of every individual" should always require that the holder of the legal title be taxed or that the holder of the equitable title be taxed, but rather that in proper cases the tax should be imposed upon the person having control of the income.

Not only have the *Robbins* and the *Corliss cases* established the principle that the individual is taxed upon income over which he can exercise rights of dominion and enjoyment rather than upon income to which he has a bare legal or equitable title, but the *Robbins case* has measured the rights of dominion and enjoyment by exceedingly practical tests. It is emphasized in that decision, for example, that the husband alone had the disposition of the fund; that he might spend it substantially

as he chose, and that if he wasted it in debauchery, the wife had no redress; that his liability for his wife's support came from a different source and existed whether there was community property or not, and that the community property, while liable to be taken for his debts, was not liable to be taken for his wife's.

An application of the same principle was made in *Lucas* v. *Earl,* 281 U. S. 111, where it was held that an agreement, assumed to be valid, between husband and wife domiciled in California that each should have an equal joint interest in all their earnings could not operate to make one-half of his salary taxable to her as her income because he earned the income and had the right to collect it.

In any event, under these decisions it is settled that the rights of ownership which the person taxed must be able to exercise are substantial rights and among such substantial rights are the rights of disposing of the income or the source of the income and the right to control the use of the income.

This test rests solidly upon the controlling purpose of the law to create a national system for the taxation of incomes without discrimination between taxpayers in the several States. The imposition of the tax "upon the net income of every individual" implies uniformity and equality in administration. But there can be neither unless the law looks through formalities of title to the rights and powers of individual taxpayers in controlling and disposing of income received. "The power of

taxation is a fundamental and imperious necessity of all government, not to be restricted by mere legal fictions." *Tyler* v. *United States,* 281 U. S. 497, 503. If married persons in the State of Texas, because of their community of interest in property which either may acquire during wedlock, are taxed upon their incomes at lower rates than married people in other States who enjoy substantially the same rights and powers with respect to the control and disposition of income, the purpose of the law will be defeated. The family is the social and economic unit upon which the burden of the tax must fall and the injustice of such inequalities in the administration of the law is apparent. Unless the tax falls ratably upon all income over which the taxpayer exercises dominion and control, uniformity in administration is unattainable and inequality becomes inevitable. Such results are to be avoided if language permits. *Boston & M. R. R. Co.* v. *United States,* 245 Fed. 578 (C. C. A. 1st), certiorari denied, 255 U. S. 577; *United States* v. *Childs,* 266 U. S. 304, 309. The test that he who has the power of disposition should bear the burden of the tax finds support in the general language of the statute and so to construe it effectuates the purpose of the law. Furthermore, this test is appropriate to the power and purpose of Congress in the imposition of taxes to deal with the substance of things regardless of formal legal fictions, a purpose which this Court has often recognized. *United States* v. *Robbins,* 269 U. S.

315; *Corliss* v. *Bowers,* 281 U. S. 376; *Tyler* v. *United States,* 281 U. S. 497; *Chase National Bank* v. *United States,* 278 U. S. 327; *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339.

It is necessary, therefore, to examine the laws and the judicial decisions of the State of Texas and to determine what substantial rights of ownership the husband and wife may exercise; that is, precisely what the husband may do and what he has a right to have done with respect to community property and income, and to make a like determination with regard to the wife.

III

Under the Laws and Judicial Decisions of the State of Texas the Husband's Interest in the Community Income During Coverture Is Such That He Should Properly Be Required to Report the Entire Amount in His Return; the Wife's Interest Is Not Such That She Should Be Permitted to Report One-Half of the Community Income in Her Return [6]

The decision must turn upon consideration of the laws of the State affecting community property and of the respective rights, of the husband and wife to have control and dominion over such property and its income. But in approaching this consideration it is necessary to bear in mind that certain limitations upon the husband's power to deal

[6] The following material to stars on p. 23 is common to all of our briefs in *Poe* v. *Seaborn*, No. 15; *Hopkins* v. *Bacon*, No. 84; *Bender* v. *Pfaff*, No. 86; *Goodell* v. *Koch*, No. 106.

even with his own property universally arise from the marital relationship and the husband's obligation to support his wife and make provision for her support after his death. Thus a limited right in the wife to bind the community by contracts for necessities is not a substantial right and should be disregarded, for it is comparable to the right which the wife had at common law to obtain necessities on the credit of the husband and to bind his separate property. *McFerren* v. *Goldsmith-Stern Co.*, 137 Md. 573, and cases cited. Nor is a limited right to prevent a particular disposition of the community income or property by the husband important, for similar rights are enjoyed by wives in States which do not have the community-property system. There is, for example, a Utah statute providing that no assignment of the husband's wages shall be valid unless assented to by the wife in writing. Compiled Laws of Utah, 1917, Par. 4385. It would scarcely be urged that the possession of such rights by a wife would afford sufficient reason for taxing a part of the husband's income to the wife.

Nor would it be important if the wife could prevent her husband from disposing of more than one-half of the common property by will. This gives the wife no greater right (except as to the amount) than she has in Oklahoma, where the husband is prevented from bequeathing away from his wife so much of his estate that she would receive less than what would be obtained by succession at law. Act of April 9, 1925, amending Section 11224

of the Compiled Statutes of Oklahoma, Session Laws, 1925, p. 30.

Similarly, in Minnesota (omitting reference to some unimportant exceptions and special provisions) the widow is entitled—subject to the payment of the husband's debts and expenses of administration—to one-third of the personal property then belonging to his estate and one-third of all real estate (other than the homestead, in which she is entitled to a life estate) of which he shall have been seized during coverture, the conveyance of which she has not assented to in writing. General Statutes, Minnesota, 1923, Sections 8718–8720, 8726.

So far as we have been able to ascertain every State in the Union which does not have a community property law, with the exception of North Dakota and South Dakota, makes some positive provision for the widow in relation to the husband's real estate, and even those States protect the wife's interest in the homestead. In practically all States provisions which give to the wife the assurance of receiving a certain proportion of the husband's real estate upon his death are accompanied by provisions which prevent him from conveying his real estate without her consent during his life in such a way as to defeat her dower or other statutory interest.

In the consideration of the local law, local "refinements of title" should be ignored and enquiry should be directed, in the language of the *Corliss*

case, to "actual command" of the income taxed, so that, in accordance with the decision in the *Robbins case,* the statutory intent that he who has all the power shall bear the burden may be accomplished. This enquiry will find conclusive answer in the statutes and prevailing decisions of the State, but the subject matter is of ancient origin and the precedents should be read with the prevailing conception of the husband's right of command over community property and income always in mind. For this purpose no better statement can be found than what was said by this Court in *Garrozi* v. *Dastas,* 204 U. S. 64, 78:

> The question, therefore, is this: Is the power of the husband, as the head and master and administrator of the community, in its nature so restricted that in the absence of express limitation he can, after the dissolution of the community, be called to account and compelled to return to the community money which he has actually expended during the existence of the community, because, in the judgment of a court, such expenses may be deemed to have been not suitable to his situation in life, extravagant, or even reckless? To answer this question in the affirmative would be to destroy the whole fabric of the community system as prevailing, not only under the Spanish and Porto Rican Codes but as obtaining in those countries of the continent of Europe and here where that system prevails. We need not consider whether the community was derived from the Roman law, from an ex-

press provision of the early Saxon law, or from the ancient customary law of the continent. For, however derived, the very foundation of the community and its efficacious existence depend on the power of the husband, during the marriage, over the community, and his right, in the absence of fraud or express legislative restriction, to deal with the community and its assets as the owner thereof. The purpose of the community, as expounded from the earliest times, whilst securing to the wife on the dissolution of the marriage an equal portion of the net results of the common industry, common economy, and common sacrifice, was yet, as a matter of necessity, during the existence of the community, not to render the community inept and valueless to both parties by weakening the marital power of the husband as to his expenditures and contracts, so as to cause him to be a mere limited and consequently inefficient agent. (See a very full citation of authority in Journal du Palais Repertoire, verbo, communaute', 739, 741, *et seq.*)

In determining the authority of the husband as to the common property two considerations are essential: The character of the right of the wife to the common property during the existence of the marriage and the scope of the power of the husband during the same period.

With these preliminary considerations in mind, we turn to the statutes and judicial decisions of the State of Texas which disclose the rights of the

spouses to control and enjoy community property and its income.

* * * * * [7]

At the outset it is important to note that the definition of the term "community property" in Article 4619 of the Revised Civil Statutes, as amended, *infra,* is exceedingly broad and that the Texas courts have construed the term as embracing very nearly all income which the spouses receive either from their separate property or from community property and their personal labor. *Braden* v. *Gose,* 57 Texas 37; *Claflin & Co.* v. *Pfeiffer,* 76 Texas 469; *Dixon* v. *Sanderson,* 72 Texas 359; *Arnold* v. *Leonard,* 114 Texas 535.

In 1917 the State legislature attempted to make the rents and revenues from the wife's separate lands her separate property and the rents and revenues of the husband's separate lands his separate property. Act of April 4, 1917, Laws of Texas, 1917, Reg. Sess., c. 194, p. 436. The Supreme Court of the State, however, in *Arnold* v. *Leonard, supra,* subsequently held that this Act and the Act of March, 1921, Gen. Laws of Texas, 37th Leg., c. 130, p. 251, containing similar provisions were unconstitutional in so far as they increased the wife's separate property over that allowed to her in Article XVI, Section 15, of the Constitution (*infra,* p. 42), which limited her separate estate to property "owned or claimed by her before marriage, and that acquired afterward by gift, devise, or descent."

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[7] See footnote 6, p. 18.

For the same reason, the provision now contained in Article 4615 of the Revised Statutes, making compensation for personal injuries to the wife her separate property, has also been held to be unconstitutional. *Northern Texas Traction Co.* v. *Hill,* 297 S. W. 778;[8] *Teague* v. *Fairchild,* 15 S. W. (2d) 585.

By virtue of Article 4619 of the Revised Civil Statutes, as amended, *infra,* there is in Texas, as in other community property States, a presumption that all property of the spouses constitutes community property. The presumption is rigorously applied in Texas. *Cooke* v. *Bremond,* 27 Texas, 457; *Oppenheimer* v. *Robinson,* 87 Texas, 174.

Not only is it true that all income from the separate property of the wife as well as from community property, excepting capital gains resulting from accretions in the value of her separate property, is part of the community (*Arnold* v. *Leonard, supra*), but it also appears that the spouses have no power by agreement to change its character in advance of its receipt. *Kellett* v. *Trice,* 95 Texas, 160; *McDonald* v. *Stevenson,* 245 S. W. 777. Granting that the husband may give the wife his interest in community property so long as the gift does not in-

[8] The citations to Texas cases in this brief are to the official reports whenever possible. But many cases decided by the Texas Court of Civil Appeals and by the Texas Commission of Appeals are not officially reported, and in such instances reference is made to the Southwestern Reporter.

terfere with the rights of creditors (*Cauble* v. *Beaver-Electra Ref. Co.,* 115 Texas, 1), yet, under the decision in the *Leonard case, supra,* the income from the gift would nevertheless be community property. The husband and wife have no power to change the character of this income prior to its receipt. *Cox* v. *Miller,* 54 Texas, 16; *Green* v. *Ferguson,* 62 Texas, 525; *Martin* v. *Martin,* 17 S. W. (2d) 789; *Brokaw* v. *Collett,* 1 S. W. (2d) 1090. The latter case was decided by the Commission of Appeals and its judgment affirmed by the Supreme Court.

The Texas courts have not adopted the theory that the community is a legal entity. Analogies are drawn in some of the opinions to partnership and trust cases and principles applicable in such cases have been applied to the community. *Simpson* v. *Brotherton,* 62 Texas, 170; *Moody* v. *Smoot,* 78 Texas, 119; *Briggs* v. *McBride,* 190 S. W. 1123; *Stramler* v. *Coe,* 15 Texas, 211; *Burnham* v. *Hardy Oil Co.,* 108 Texas, 555; 35 Harvard Law Review, 62–63; *Patty* v. *Middleton,* 82 Texas, 586. It must also be admitted that the Texas courts generally recognize that the wife has a "present" or "vested" interest of some kind in the community property. *Edwards* v. *Brown,* 68 Texas, 329; *Arnold* v. *Leonard, supra; Patty* v. *Middleton, supra; Burnham* v. *Hardy Oil Co., supra.* But all such analogies and characterizations break down under comparison of rights and obligations established in statutes and decisions of controlling force. As we

have argued, such theories are not material to the decision which must turn upon actual rights of dominion and control and not upon the names which may have been given to the ganglia of rights and interests involved.

(A)

DURING THE EXISTENCE OF THE COMMUNITY, AND SO LONG AS THE HUSBAND DOES NOT ABANDON HIS WIFE, HE ALONE HAS UNRESTRICTED POWER TO MAKE CONTRACTS AND BRING SUITS RELATING TO COMMUNITY PROPERTY AND TO SELL, MORTGAGE, OR OTHERWISE DISPOSE OF IT, EXCEPT THAT HE MAY NOT GIVE IT AWAY WITH THE DELIBERATE INTENTION OF DEFRAUDING HIS WIFE

Article 4619, Revised Civil Statutes, as amended, *infra.*

Stramler v. *Coe,* 15 Texas, 211.
Moody v. *Smoot,* 78 Texas, 119.
Coss v. *Coss,* 207 S. W. 127.
Bell v. *Crabb,* 244 S. W. 371.
Jordan v. *Moore,* 65 Texas, 363.
Rowlett v. *Mitchell,* 52 Tex. Civ. App. 589.
Briggs v. *McBride,* 190 S. W. 1123.
Wiener v. *Zweib,* 105 Texas, 262.
First Nat. Bank v. *Davis,* 5 S. W. (2d) 753.
Dallas Plumbing Co. v. *Harrington,* 275 S. W. 190.

Article 4619 of the Revised Civil Statutes, *infra,* provides that during the existence of the community the husband alone shall have the right to dispose of community property. Article 4614, *infra,* provides that the wife shall have "the sole manage-

ment, control, and disposition" of her "separate property." This section also defines her separate estate as including rents, revenues, interest, and dividends derived therefrom. In *Arnold* v. *Leonard, supra,* the Supreme Court of Texas held that the Legislature was without power to include these items in the separate property of the wife. It follows from Article 4619, which gives the husband exclusive power of disposition over all community property, and Article 4614, which confines the wife's control and management to her separate estate, that the rents, revenues, interest, and dividends derived from the wife's separate estate are within his exclusive control.

This was not the rule prior to the enactment of the Revised Civil Statutes. *Arnold* v. *Leonard,* supra; *Gohlman, Lester & Co.* v. *Whittall,* 114 Tex. 548; *Cauble* v. *Beaver-Electra Ref. Co.,* 115 Tex. 1. See Act of March 21, 1913, Laws of Texas, 1913, Reg. Sess. c. 32, p. 61; Act of April 4, 1917, Laws of Texas, 1917, Reg. Sess. c. 194, p. 436. The Act of 1913 gave the wife the control, management, and disposition of her personal earnings, rents from her real estate, interest on her bonds and notes, and dividends on her stocks. The Act of 1917 attempted to add these items, excepting her personal earnings, to her separate estate. But the Revised Civil Statutes of 1925 omit the provision of the Act of 1913 giving the wife the control, management, and disposition of her earnings, rents, interest, and dividends. In *Arnold* v. *Leonard, supra,*

the Act of 1917 was held unconstitutional in attempting to include these items, except personal earnings, in the separate estate of the wife. Thus the wife is left with the control of her separate property only as provided in Art. 4614, Rev. Civ. St. 1925, *infra,* p. 49. In this connection it should be noted that the Revised Civil Statutes of 1925 are more than a mere compilation of existing laws, and unless their provisions are ambigious there is no propriety in looking to the prior laws in their interpretation. *American Indemnity Co.* v. *Austin,* 112 Tex. 239; *City of Lubbock* v. *The Magnolia Petroleum Co.,* 6 S. W. (2d) 80. See also *Hamilton* v. *Rathbone,* 175 U. S. 414; *United States* v. *Bowen,* 100 U. S. 508; *Reese* v. *Cobb,* 105 Texas 399.

We maintain, therefore, that during 1927 the husband alone had the right "to dispose" of all of the community income and property.

In interpreting the statutes the Texas courts have not sought to hamper the husband's powers in any way so long as he does not deliberately defraud his wife. In *Moody* v. *Smoot,* 78 Texas 119, *supra,* with regard to the husband's control of community property the Supreme Court of Texas said (p. 123):

> Barring any disposition made with intent to defraud her, he may sell, barter, or give it away.

To the same effect is the very recent case of *Shaw* v. *Shaw,* 28 S. W. (2d) 173.

No distinction is made between the husband's right to dispose of community personalty and

community real estate. It is not essential that the wife join in the deed conveying community real estate. *Bell* v. *Crabb, supra,* decided by the Commission of Appeals, the judgment later being entered as the judgment of the Supreme Court of Texas. The husband may also mortgage the community personal property or real estate without his wife's consent. *Sutton* v. *Lovan,* 279 S. W. 295; *Wiener* v. *Zweib, supra; First National Bank* v. *Davis, supra; Brunson* v. *Donald,* 3 S. W. (2d) 596.

The only limitation is as to the homestead. Under Article 4618 of the Revised Civil Statutes, *infra,* it is provided that the homestead, whether it represents community or the separate property of one of the spouses, shall not be disposed of except by the joint conveyance of husband and wife. See also *Flynn* v. *J. M. Radford Grocery Co.,* 174 S. W. 902.

The rule that the husband can not deliberately defraud his wife by gifts of the community property is one that has not been applied except under extraordinary circumstances. Under normal circumstances he may freely dispose of community property by gift and the question as to whether the disposition will benefit the wife or the community is not given consideration. *Rowlett* v. *Mitchell,* 52 Tex. Cir. App. 589, *supra; Coss* v. *Coss, supra; Martin* v. *McAllister,* 94 Texas 567.

In the *Coss case* the husband had abandoned his wife and was ruthlessly depriving her of her means of support by giving away his property to his mistress. Under such circumstances the court held that the wife was entitled to protection. Similarly, in *Krenz* v. *Strohmeir,* 177 S. W. 178, writ of error refused, 188 S. W. xvi, the court held that where a husband with intent to defraud his wife placed property bought with community funds in the name of his son, no consideration passing from the son, the son acquired legal title, but the deeds were ineffective to deprive the wife of her equitable estate.

On the other hand, in *Rowlett* v. *Mitchell, supra,* it was held that where a husband of limited means had continued to pay premiums on a life-insurance policy, taken out before his marriage for the benefit of his children by a former wife, the wife could not follow and recover funds of the community disposed of for such purposes.

The right of disposition carries with it the right to enter into any kind of contract relating to community property without consulting the wife. The husband is the "manager" with all the powers that the term implies. *Wright* v. *Hays,* 10 Texas 130; *Moody* v. *Smoot,* 78 Texas 119, *supra; Dallas Plumbing Co.* v. *Harrington,* 275 S. W. 190, *supra; Arnold* v. *Leonard,* 114 Texas 535, *supra.* He alone can sue and collect community claims. *Jordan* v. *Moore,* 65 Texas 363, *supra.*

(B)

DURING THE EXISTENCE OF THE COMMUNITY THE COMMUNITY PROPERTY IS MADE LIABLE FOR THE PAYMENT OF ALL DEBTS INCURRED BY THE HUSBAND AND ALL JUDGMENTS SECURED AGAINST HIM OF WHATEVER NATURE, AND HE AND HIS SEPARATE PROPERTY ARE LIABLE FOR THE PAYMENT OF ALL COMMUNITY DEBTS

Articles 4616, 4620, 4621, 4623, 4634, Revised Civil Statutes, *infra.*

Ochoa v. *Edwards,* 189 S. W. 1022, writ of error refused, 190 S. W. xv.

Braden v. *Gose,* 57 Texas 37.

Seabrook v. *First Nat. Bank,* 171 S. W. 247.

Article 4620 of the Revised Civil Statutes, *infra,* provides that the community property of husband and wife shall be liable for their debts contracted during marriage except in such cases as are specially excepted by law. In so far as the husband is concerned, the only exception to his ability to incur debts which will bind the community is that he may not incur any such debts after a suit for divorce is brought. Article 4634, Revised Civil Statutes, *infra.*

Article 4616, *infra,* however, provides that the wife's personal earnings and the rents, revenues, and interest from the wife's separate property shall not be subject to any debts or torts of the husband.

The net result is that so long as the husband and wife are living together the community property (other than that mentioned in the preceding para-

graph) is liable for all of the debts incurred by the husband irrespective of the purpose for which they were incurred. In other words, the debts of the husband are community debts. *Ochoa* v. *Edwards, supra.* With the same exceptions, a judgment against him will bind the community estate. *Jordan* v. *Moore, supra,* 65 Texas 363.

(C)

DURING THE EXISTENCE OF THE COMMUNITY THE WIFE CANNOT MAKE ANY CONTRACTS, EXCEPT FOR NECESSARIES, WHICH WILL BIND THE COMMUNITY PROPERTY OTHER THAN HER PERSONAL EARNINGS AND THE INCOME, RENTS, AND REVENUES FROM HER SEPARATE PROPERTY, NOR CAN SHE SUE AND COLLECT ANY COMMUNITY CLAIM EXCEPT IN CASES WHERE SHE IS ABANDONED BY HER HUSBAND OR HE BECOMES INSANE

Articles 4619, 4621, 4623, Revised Civil Statutes, *infra.*

Fullerton v. *Doyle,* 18 Texas 3.

Wright v. *Hays,* 10 Texas 130.

Zimpelman v. *Robb,* 53 Texas 274.

Hamlett v. *Coates,* 182 S. W. 1144, writ of error refused, 190 S. W. xv.

Davis v. *Davis,* 186 S.W. 775.

Article 4621 of the Revised Civil Statutes, *infra,* specifically provides that the community property shall not be liable "for debts or damages resulting from contracts of the wife except for necessaries furnished herself and children." Article 4623, *infra,* provides that neither the separate property of the husband nor the community property other than her personal earnings and the income, rents,

and revenues from her separate property shall be subject to the payment of the wife's debts except those contracted for necessaries furnished her or her children.

The wife's power to bind the community for the purchase of necessaries is undoubtedly founded on the husband's obligation to support his wife and is not inherent in the community property system. The term "necessaries" is limited to living expenses. For example, in *Winkie* v. *Conatser,* 171 S. W. 1017, writ of error refused, 179 S. W. xvi, it was held that a debt due from the wife for a commission on the exchange of her separate property is not a necessary expense within the meaning of the provision.[9]

In the case of *Crim* v. *Austin,* 6 S. W. (2d) 348, the Commission of Appeals decided that the provision exempting the community property from liability for the wife's debts did not relate to the wife's torts and that the community property was subject to the payment of damages for torts committed by the wife. The judgment of the Commission of Appeals was affirmed by the Supreme Court. But her

[9] There is no discussion in this brief as to the powers which a wife acquires by being given the right under Article 4626, *infra*, to be declared a *feme sole* for mercantile and trading purposes, as the record does not show that the petitioner's wife had been declared a *feme sole* under this provision. Moreover, it principally affects her rights as to her separate property. For a comprehensive analysis of the wife's power to contract generally, see *Red River Nat. Bank* v. *Ferguson*, 109 Texas 287.

separate property must be first exhausted. *Zeliff* v. *Jennings,* 61 Texas 458.

The wife is not a necessary party in any action to recover on a community claim. *Dallas Ry. & Terminal Co.* v. *Sutherland,* 27 S. W. (2d) 830. Nor can she be sued without her husband being joined. *Taylor* v. *Hustead & Tucker,* 257 S. W. 232.

When the wife is abandoned by the husband, Article 4619 of the Revised Civil Statutes, *infra,* enables her under certain conditions to file a petition to secure to herself the complete control, management, and disposition of community property. While the benefit of this provision is limited to cases where the wife does not know her husband's whereabouts, it has nevertheless been recognized independently of this provision that a woman abandoned by her husband may sell community property to support herself and her family. *Zimpelman* v. *Robb,* 53 Texas, 274, *supra.* Under such circumstances she may also sue to recover community property. *Hamlett* v. *Coates, supra; Davis* v. *Davis, supra.* Nor have the courts been disposed to question the propriety of her acts so long as no actual fraud against the husband is committed. *Zimpelman* v. *Robb, supra.*

The rule as to the wife's power to bind the community property is the same in cases where the husband becomes insane. *Forbes* v. *Moore,* 32 Texas, 195.

(D)

THE WIFE CAN NOT PETITION FOR A DIVISION OF COMMUNITY PROPERTY BETWEEN HERSELF AND HER HUSBAND WITHOUT APPLYING FOR A DIVORCE, AND IF SHE APPLIES FOR A DIVORCE SHE HAS NO ASSURANCE THAT SHE WILL BE AWARDED ONE-HALF OF THE COMMUNITY PROPERTY

Articles 4634, 4635, and 4638, Revised Civil Statutes, *infra.*

Hedtke v. *Hedtke,* 112 Texas, 404.

Strickland v. *Strickland,* 276 S. W. 795.

Moor v. *Moor,* 24 Texas Civ. App. 150, writ of error refused, 58 S. W. xv.

Gonzales v. *Gonzales,* 117 Texas, 183.

Martin v. *Martin,* 17 S. W. (2d) 789.

It is well settled that the Texas wife can not compel her husband to give a certain portion of the community income or property to her by means of a suit for partition or a suit for maintenance. *Gonzales* v. *Gonzales, supra; Martin* v. *Martin, supra; Borton* v. *Borton,* 190 S. W. 192, writ of error refused, 196 S. W. xiv; *Irwin* v. *Irwin,* 110 S. W. 1011. His liability for her support exists independently of the existence of community property. *Hedtke* v. *Hedtke, supra; Magee* v. *White,* 23 Texas, 180.

It is only in connection with proceedings for a divorce that a division of the community property may be secured or that she may secure protection from her husband's expenditures of community funds. Article 4635 of the Revised Civil Statutes,

infra, enables her by injunction to restrain him from spending any community funds during the pendency of the action. Article 4638, *infra,* provides that the court granting the divorce shall make a division of their estate "in such a way as the court shall deem just and right" but directs further that nothing therein shall be construed as compelling either party to divest himself or herself of the title to real estate.

If there is no decree of partition at the time of divorce the husband and wife thereafter hold the community property as tenants in common. *Southwestern Mfg. Co.* v. *Swan,* 43 S. W. 813; *Jones* v. *Frazier,* 201 S. W. 445.

In the event that the court does enter a decree partitioning the community property, the statute clearly authorizes the court to depart from an exactly even division and the courts have so held. *Moor* v. *Moor, supra; Hedtke* v. *Hedtke, supra.* In the latter case the court said (p. 406):

> While the court, in ordering the divorce, should not be unmindful of the benefits which the spouse not at fault would have derived from a continuance of the marriage, through the estate of the other spouse, its power is not limited to providing compensation for such benefits. Instead, the court is to do complete equity as between husband and wife and the children, having due regard to all obligations of the spouses and to the probable future necessities of all concerned. For the purpose of doing equity

> the court may award all the personal property to either spouse, and may subject the income, rents, or revenues of all real estate, belonging to either or both of the spouses, to the support of either or both of them, or to the education and support of the children.

(E)

THE HUSBAND HAS AT LEAST AS MANY MATERIAL RIGHTS OF DOMINION AND ENJOYMENT OVER COMMUNITY PROPERTY AND INCOME UNDER THE LAWS OF TEXAS AS HE HAS UNDER THE LAWS OF CALIFORNIA, AND HE SHOULD BE TAXED UPON THE ENTIRE COMMUNITY INCOME.

In *United States* v. *Robbins, supra,* this Court emphasized that under the laws of California as they then stood the husband alone had the disposition of the fund; that except for the restriction as to his making gifts, he could spend it as he pleased and the wife had no redress; that his liability for her support came from a different source and existed whether there was community property or not; and that the fund taxed was liable to be taken for his debts but was not liable to be taken for his wife's.

The powers of the husband in Texas are practically the same. There, as in California, at the time of the *Robbins case,* he may dispose of the community property, real and personal. There is no statutory restriction against gifts, such as exists in California, and there is no restriction as to the wife's joining in deeds and mortgages. See Civil Code of California, 1915, Sec. 172. He may spend

the community fund as he chooses provided that he does not deliberately defraud his wife. As in California, the wife has no redress so long as she continues to live with her husband and can not secure any portion of the community income or property for her own use except that she may contract for necessities and make the community property liable.

The one material difference between California and Texas appears to be that in Texas the community property, which consists of her personal earnings and the rents, dividends, and interest from her separate property, is made liable for her individual debts and is not liable for her husband's debts. In California such income, other than the wife's earnings, would constitute the separate income of the wife. As to all other community property, in both States such property is liable for the payment of the husband's debts but not for those of the wife. Moreover, the husband and his separate property are liable for the payment of community debts while the wife and her separate estate are not.

As to all community income other than the wife's earnings and the rents, dividends, and interest from her separate property the reasons for taxing the income to the husband are as compelling in the case of the Texas husband as in the case of the California husband. Nor do we think that the Texas wife's earnings and the rents, dividends, and interest from her separate property should be excluded

from the husband's return. The provision making them liable for her separate debts and exempting them from his does not remove them from his control. They remain community property and under the husband's control; and when intermingled with community funds they would of course be treated as any other part of the common fund. See McKay, Community Property, Section 298.

CONCLUSION

The decision of the Circuit Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted.

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APPENDIX

UNITED STATES STATUTES

The Revenue Act of 1926, c. 27, 44 Stat. 9, 21-22, 37, 130, provides, in part, as follows:

> SEC. 210. (a) In lieu of the tax imposed by section 210 of the Revenue Act of 1924, there shall be levied, collected, and paid for each taxable year upon the net income of every individual (except as provided in subdivision (b) of this section) a normal tax of 5 per centum of the amount of the net income in excess of the credits provided in section 216, except that in the case of a citizen or resident of the United States the rate upon the first $4,000 of such excess amount shall be 1½ per centum, and upon the next $4,000 of such excess amount shall be 3 per centum * * *. (U. S. C. App., Title 26, Sec. 951.)
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> SEC. 211. (a) In lieu of the tax imposed by section 211 of the Revenue Act of 1924, but in addition to the normal tax imposed by section 210 of this Act, there shall be levied, collected, and paid for each taxable year upon the net income of every individual a surtax as follows * * *. (U. S. C. App., Title 26, Sec. 952.)
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> SEC. 223. (a) The following individuals shall each make under oath a return stating

specifically the items of his gross income and the deductions and credits allowed under this title—

(1) Every individual having a net income for the taxable year of $1,500 or over, if single, or if married and not living with husband or wife;

(2) Every individual having a net income for the taxable year of $3,500 or over, if married and living with husband or wife; and

(3) Every individual having a gross income for the taxable year of $5,000 or over, regardless of the amount of his net income.

(b) If a husband and wife living together have an aggregate net income for the taxable year of $3,500 or over, or an aggregate gross income for such year of $5,000 or over—

(1) Each shall make such a return, or

(2) The income of each shall be included in a single joint return, in which case the tax shall be computed on the aggregate income.

(c) If the taxpayer is unable to make his own return, the return shall be made by a duly authorized agent or by the guardian or other person charged with the care of the person or property of such taxpayer. (U. S. C. App., Title 26, Sec. 964.)

SEC. 1212. Income for any period before January 1, 1925, of a marital community in the income of which the wife has a vested interest as distinguished from an expectancy, shall be held to be correctly returned if returned by the spouse to whom the income be-

longed under the State law applicable to such marital community for such period. Any spouse who elected so to return such income shall not be entitled to any credit or refund on the ground that such income should have been returned by the other spouse. (U. S. C. App., Title 26, Sec. 964a.)

TEXAS CONSTITUTION AND STATUTES

Constitution, Texas, Art. XVI:

SEC. 15. All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterward by gift, devise, or descent, shall be her separate property; and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property as that held in common with her husband. Laws shall also be passed providing for the registration of the wife's separate property.

Revised Civil Statutes, Texas, 1925, Vols. I and II.

ART. 1299. *Conveyance of separate lands of wife.*—The husband and wife shall join in the conveyance of real estate, the separate property of the wife; and no such conveyance shall take effect until the same shall have been acknowledged by her privily and apart from her husband before some officer authorized by law to take acknowledgments to deeds for the purpose of being recorded, and certified to in the mode pointed out in articles 6605 and 6608.

ART. 1300. *Conveyance of homestead.*—The homestead of the family shall not be sold and conveyed by the owner, if a married man, without the consent of the wife. Such consent shall be evidenced by the wife joining in the conveyance, and signing her name thereto, and by her separate acknowledgment thereof taken and certified to before the proper officer, and in the mode pointed out in articles 6605 and 6608.

ART. 1983. *For wife's separate property.*—The husband may sue either alone or jointly with his wife for the recovery of the separate property of the wife; and, in case he fails or neglects so to do, she may sue alone by authority of the court.

ART. 1984. *Against husband and wife for necessaries.*—The husband and wife shall be jointly sued for all debts contracted by the wife for necessaries furnished herself or children and for expenses which may have been incurred by the wife for the benefit of her separate property.

ART. 1985. *For wife's debts, etc.*—The husband shall be joined in suits for separate debts and demands against the wife, but no personal judgment shall be rendered against the husband.

ART. 2578. *Community estate.*—Upon the dissolution of the marriage relation by death, all property belonging to the community estate of the husband and wife shall go to the survivor, if there be no child or children of the deceased or their descendants; but if there be a child or children of the deceased,

or descendants of such child or children, then the survivor shall be entitled to one-half of said property, and the other half shall pass to such child or children, or their descendants. But such descendants shall inherit only such portion of said property as the parent through whom they inherit would be entitled to if alive.

ART. 2579. *Passes charged with debts.*—In every case, the community estate passes charged with the debts against it.

ART. 3661. *Community property.*—The community property of the husband and wife, except such as is exempt from forced sale, shall be liable for all the debts contracted during marriage. And, in the settlement of such community estates, the survivor, executor or administrator shall keep a separate and distinct account of all the community debts allowed or paid in the settlement of such estates.

ART. 3662. *Where there is no child.*—Where the husband or wife dies intestate, or becomes insane, having no child or children, and no separate property, the common property passes to the survivor, charged with the debts of the community; and no administration thereon or guardianship of the estate shall be necessary.

ART. 3663. *When husband shall have management.*—Where the wife dies or becomes insane, leaving a surviving husband and child, or children, the husband shall have exclusive management, control and disposition of the community property in the same

manner as during her lifetime, or sanity; and it shall not be necessary that the insane wife shall join in conveyances of such property, or her privy examination and acknowledgment to be taken to such conveyances, subject, however, to the provisions of this chapter.

ART. 3664. *Application for community administration.*—The husband shall, within four years after the death of the wife, or her being declared insane, when there is a child or children, file a written application in the county court of the proper county stating:

1. The death of his wife, or that she has been declared insane by a court of competent jurisdiction, and the time and place of her death or of such declaration.

2. That she left a child or children, giving the name, sex, residence and age of each child.

3. That there is a community estate between the deceased or insane wife and himself.

4. Such facts as show the jurisdiction of the court over the estate.

5. Asking for the appointment of appraisers, to appraise such estate.

ART. 3666. *Inventory, appraisement, etc.*—The surviving husband or wife (of community estates) with the assistance of any two of the appraisers, shall make out a full, fair and complete inventory and appraisement of the community estate; and the survivor shall attach thereto a list of all community debts due the estate, and shall also

attach thereto a list of all indebtedness due by said community estate to other parties, giving the amount of each debt and the name of the party or parties to whom it is due, and his or their post-office address; and such inventory, list of claims, and list of indebtedness of such community estate shall be sworn to by said survivor; and the inventory, appraisement and list of claims due said community estate shall be sworn to by said appraisers; and said inventory, appraisement, list of claims due said estate and list of indebtedness due by said estate shall be returned to the court within twenty days from the date of the order appointing appraisers in like manner as other administrations.

ART. 3667. *Bond of survivor.*—The surviving husband shall, at the time he returns the inventory, appraisement, and list of claims, present to the court his bond with two or more good and sufficient sureties, payable to and to be approved by the county judge, in a sum equal to the whole of the value of such community estate as shown by the appraisement, conditioned that he will faithfully administer such community estate, and pay over one-half the surplus thereof after the payment of the debts with which the whole of such property is properly chargeable to such person or persons as shall be entitled to receive the same.

ART. 3668. *Action of the court.*—When such inventory, appraisement, list of claims

and bond are returned to the county judge, he shall, either in term time or vacation, examine the same and approve or disapprove them by an order to that effect entered upon the minutes of the court, and, when approved, they shall be recorded upon the minutes of the court, and the order approving them shall also authorize such survivor to control, manage and dispose of such community property in accordance with the provisions of this chapter.

ART. 3669. *Survivor has control.*—When the order mentioned in the preceding article has been entered, such survivor, without any further action in the county court, shall have the right to control, manage and dispose of such community property as may seem for the best interest of the estate and of suing and being sued with regard to the same, in the same manner as during the lifetime of the deceased; and a certified copy of the order of the court mentioned in the preceding article shall be evidence of the qualification and right of such survivor.

ART. 3670. *Survivor shall keep account.*—The survivor shall keep a fair and full account and statement of all community debts and expenses paid by him, and of the disposition made of such community property; and, upon final partition of said estate, shall account to the legal heirs of the deceased for their interest in such estate, and the increase and profits of the same, after deducting therefrom all community debts, unavoidable

losses, necessary and reasonable expenses, and a reasonable commission for the management of the same.

ART. 3672. *Survivor to pay debts.*—The survivor shall pay all just and legal community debts as soon as practicable, and according to the classification and in the order prescribed for the payment of debts in other administrations.

ART. 3678. *Surviving wife.*—The wife may retain the exclusive management, control and disposition of the community property of herself and deceased or insane husband in the same manner, and subject to the same rights, rules and regulations as provided in the case of the husband and until she shall, in the event of the death of the husband, marry again, and in such event her right to manage, control and dispose of the community property shall cease; provided, however, that when no administration is had upon the estate of the deceased husband, as is provided under Article 3680, she may renew, and extend the maturity date, of valid existing debts of the community estate, and any lien securing same.

ART. 3680. *Rights of wife cease when.*—Upon the marriage of the surviving wife, she shall cease to have control and management of said estate or the right to dispose of the same; and said estate shall be subject to administration as in other cases of deceased persons' estates.

ART. 3681. *May have partition.*—After the lapse of twelve months from the filing of the

bond by the survivor, the persons entitled to the deceased's share of such community estate, or any portion thereof, shall be entitled to have a partition and distribution thereof in the same manner as in other administrations.

ART. 4613. *Husband's separate property.*—All property of the husband, both real and personal, owned or claimed by him before marriage, and that acquired afterwards by gift, devise, or descent, as also the increase of all lands thus acquired, and the rents and revenues derived therefrom, shall be his separate property. The separate property of the husband shall not be subject to the debts contracted by the wife, either before or after marriage, except for necessaries furnished herself and children after her marriage with him, nor for torts of the wife. During marriage the husband shall have the sole management, control and disposition of his separate property, both real and personal.

ART. 4614. *Wife's separate property.*—All property of the wife, both real and personal, owned or claimed by her before marriage, and that acquired afterward by gift, devise or descent, as also the increase of all lands thus acquired, and the rents and revenues derived therefrom, the interest on bonds and notes belonging to her and dividends on stocks owned by her, shall be the separate property of the wife. The wife shall have the sole management, control and disposition of her separate property, both real and per-

sonal; provided however, the joinder of the husband in the manner now provided by law for conveyances of the separate real estate of the wife shall be necessary to the incumbrance or conveyance by the wife of her lands, and the joint signature of the husband and wife shall be necessary to a transfer of stocks and bonds belonging to her or of which she may be given control by this law.

ART. 4615. *Compensation for personal injuries to wife.*—All property or moneys received as compensation for personal injuries sustained by the wife shall be her separate property, except such actual and necessary expenses as may have accumulated against the husband for hospital fees, medical bills and all other expenses incident to the collection of said compensation.

ART. 4616. *Wife's separate property protected.*—Neither the separate property of the wife, nor the rents from the wife's separate real estate, nor the interest on bonds and notes belonging to her, nor dividends on stocks owned by her, nor her personal earnings, shall be subject to the payment of debts contracted by the husband nor of torts of the husband.

ART. 4617. *When wife may convey, etc.*—If the husband be insane or shall have permanently abandoned his wife, or shall refuse to join in such encumbrance, conveyance or transfer of such property, the wife may apply to the district court of the county of her residence, and the court, in term time or vacation, upon satisfactory proof that such

encumbrance, conveyance or transfer would be advantageous to the interests of the wife, shall make an order granting her permission to make such encumbrance, conveyance or transfer without the joinder of her husband, and she may then encumber, convey or transfer said property without such joinder.

ART. 4618. *Sale of homestead.*—The homestead, whether the separate property of the husband or wife, or the community property of both, shall not be disposed of except by the joint conveyance of both the husband and the wife, except where the husband is insane or has permanently abandoned the wife, in which instances the wife may sell and make title to any such homestead, if her separate property, in the manner herein provided for conveying or making title to her other separate property.

ART. 4619. *Community property.*—All property acquired by either the husband or wife during marriage, except that which is the separate property of either, shall be deemed the common property of the husband and wife, and during coverture may be disposed of by the husband only. All the effects which the husband and wife possess at the time the marriage may be dissolved shall be regarded as common effects or gains, unless the contrary be satisfactorily proved.

ART. 4620. *Community property liable for debts.*—The community property of the husband and wife shall be liable for their

debts contracted during marriage, except in such cases as are specially excepted by law.

ART. 4621. *Community property not liable.*—The community property of the husband and wife shall not be liable for debts or damages resulting from contracts of the wife except for necessaries furnished herself and children, unless the husband joins in the execution of the contract; provided, that her rights with reference to the community property on permanent abandonment by the husband shall not be affected by this provision.

ART. 4622. *Funds in bank.*—Funds on deposit in any bank or banking institution, whether in the name of the husband or wife, shall be presumed to be the separate property of the party in whose name they stand, regardless of who made the deposit, and unless said bank or banking institution is notified to the contrary, it shall be governed accordingly in honoring checks and orders against such account.

ART. 4623. *Subject to debts of wife.*—Neither the separate property of the husband nor the community property other than the personal earnings of the wife, and the income, rents and revenues from her separate property, shall be subject to the payment of debts contracted by the wife, except those contracted for necessaries furnished her or her children. The wife shall never be the joint maker of a note or a surety on any bond or obligation of another without the joinder of her husband with her in making such contract.

ART. 4624. *Judgment and execution.*— Upon the trial of any suit as provided for in the preceding article, if it shall appear to the satisfaction of the court and jury that the debts so contracted or expenses so incurred were for the purposes enumerated in said article, and also that the debts so contracted or expenses so incurred were reasonable and proper, the court shall decree that execution may be levied upon either the common property or the separate property of the wife at the discretion of the plaintiff.

ART. 4626. *Application to be feme sole.*— Any married woman within this State may, with the consent of and joined by her husband, apply by written petition addressed to the district court of the county in which she may be a bona fide resident for judgment or orders of the said court removing her disabilities of coverture and declaring her feme sole for mercantile and trading purposes. Such petition shall set out the causes which make it to the advantage of said married woman to be so declared feme sole, and shall be filed and docketed as in other cases, and at any time thereafter the district court may, in term time, take up and hear said petition and evidence in regard thereto. If upon a hearing of said petition and evidence relating thereto, it appears to the court that it would be to the advantage of the woman applying, then said court shall enter its decree declaring said married woman feme sole for mercantile or trading purposes, and thereafter she may, in her

own name, contract and be contracted with, sue and be sued, and all of her separate property not exempt from execution under the laws of Texas shall thereafter be subject to her debts and liable under execution therefor, and her contracts and obligations shall be binding on her.

ART. 4627. *Rights of persons married elsewhere.*—The marital rights of persons married in other countries who may remove to this State shall, in regard to property acquired in this State, during the marriage, be regulated by the laws of this State.

ART. 4634. *Debts created after suit.*—On and after the day on which the suit for divorce shall be brought, it shall not be lawful for the husband to contract any debts on account of the community, nor to dispose of the lands belonging to the same; and any alienation made by him after that time shall be null and void, if it be proved to the satisfaction of the court that such alienation was made with a fraudulent view of injuring the rights of the wife.

ART. 4635. *Inventory and appraisement.*—At any time during a suit for divorce the wife may, for the preservation of her rights, require an inventory and an appraisement to be made of both real and personal estate which are in the possession of the husband, and an injunction restraining him from disposing of any part thereof in any manner.

ART. 4638. *Division of property.*—The court pronouncing a decree of divorce shall also decree and order a division of the

estate of the parties in such a way as the court shall deem just and right, having due regard to the rights of each party and their children, if any. Nothing herein shall be construed to compel either party to divest himself or herself of the title to real estate.

Texas, General and Special Laws, Regular Session, 1927, Chapter 148:

(Title omitted.)

Be it enacted by the Legislature of the State of Texas:

That Article 4619, Chapter 3, of Title 75 of the Revised Civil Statutes of the State of Texas, 1925, shall be and the same is hereby amended so as to hereafter read as follows:

SECTION 1. All property acquired by either the husband or wife during marriage, except that which is the separate property of either, shall be deemed the common property of the husband and wife; and all the effects which the husband and wife possess at the time the marriage may be dissolved shall be regarded as common effects or gains, unless the contrary be satisfactorily proved. During coverture the common property of the husband and wife may be disposed of by the husband only; provided, however, if the husband shall have disappeared and his whereabouts shall have been and remain unknown to the wife continuously for more than twelve months, the wife shall after such twelve-month period and until the husband returns to her and the affidavit hereinafter provided

for is made and filed for record, have full control, management and disposition of the community property, and shall have the same powers with reference thereto as are conferred by law upon the husband, and her acts shall be as those of a feme sole.

SEC. 2. If the wife shall hereafter desire to exercise any of the powers herein conferred upon her, she shall file a petition in writing under oath in the district court of the county in which the husband resided at the time of such disappearance, if he then resided in this State, or in the district court of the county in which the wife resided, if the husband was a nonresident of this State at the time of such disappearance, or of any county in which the community property or part thereof is situated, in which petition the wife shall set forth the facts entitling her to control, manage, and dispose of the community property under the provisions of this article.

SEC. 3. After the filing of said petition the judge of said court shall set the same down for hearing, either in term time or vacation.

SEC. 4. Notice of the filing of said petition and the date set for the hearing thereon shall be issued by the clerk of the court in which the petition is filed and the same shall be published in some newspaper of general circulation published in the county in which the petition is filed, if there be a newspaper published in said county, but if not then in the nearest county where a newspaper of

general circulation is published, once in each week for two consecutive weeks previous to the date set for said hearing, the first of which publications shall be not less than ten days prior to such date set for such hearing.

SEC. 5. If, upon the hearing of said petition, the judge shall be satisfied that the facts alleged therein are true, and that facts exist which entitle the wife to control, manage, and dispose of the community property under the provisions of Section 1 of this Act, he shall make his order finding and setting out such facts, and thereafter the wife shall have the same powers over the community property as are conferred by law upon the husband, until the husband shall have returned to the wife, and until either the husband or wife shall make and file for record in the office of the county clerk of the county in which said petition was filed, his or her affidavit stating the fact of such return. Said affidavit shall be recorded in the deed records of said county and may be accorded [recorded] in the deed records of other counties in which the property of said community estate may be situated.

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